know exactly what the charges and what our theory is, that would be spelled out in an indictment. And that argument is very well taken; however, this is not factually not a very complex case as far as these individuals go. They were all approached by one of the targets. They were told certain things about why they were getting money and they signed some forms, usually in one or two meetings. It's going to be very easy for the targets to understand that the crux of their testimony is what they were told about the documents they were signing, whether they were told that it was just charity or whether they were told that any annuities or bonds would be purchased. It's really not rocket science. And making an argument that it's completely impossible to predict what this case will be and exactly how we're going to charge it, in my view, is really misleading. These people have one or two interactions with some of the targets in this case, and they can very easily be asked the same exact questions they would be asked if they were at trial, which is what was told to you, what was the reason why you accepted this money, did you have any idea that your name was going to be used. It's not that complicated.

And I would submit, your Honor, that the real motivation is to not allow us to have these

depositions, which they would be there, they would be able to cross-examine these defendants and their Crawford rights would be protected. So as time goes by these witnesses will disappear, and it will make the Government's job of bringing this case much more difficult.

THE COURT: But every one of these witnesses has met with an investigator at this point, right?

MR. VILKER: Everyone has met with the FBI agent except for Mr. Garvey in Las Vegas, we're still trying to arrange a meeting, or an investigator from one of these insurance companies.

THE COURT: So if a grand jury were convened, you would be able to put the FBI agent on the stand to testify as to what each of these individuals has told the agent as to what happened with these individuals, right?

MR. VILKER: Absolutely.

THE COURT: So all of that could be put before a grand jury tomorrow.

MR. VILKER: Absolutely.

THE COURT: The grand jury is convened.

MR. VILKER: That's true, your Honor. I guess, in listening to your questions to Mr. McAdams, a case like this to put together is enormously complex.

There's lots of witnesses that need to be interviewed. They dealt with a lot of different social workers who were involved. They got a legal opinion at one point. There's the fine tracing of where all the money went to. The Government is not in a position at this moment, and I told counsel for Mr. Caramadre that this will likely be in all likelihood six months to another year until we're at a point where we can even make the decision do we have enough evidence to prove this case beyond a reasonable doubt, which is the standard we use. We are nowhere near that point now. By the time we do a full investigation, which we owe to these targets to make sure there's enough probable cause, will be many months from now. By that point, all of these people will die.

The alternative of rushing to the grand jury, getting an indictment and have a public accusation against these individuals where we don't feel comfortable there's enough evidence to convict these people beyond a reasonable doubt would be a disservice to them. The end result of this investigation may very well be a determination that we don't have enough evidence, and that may be the end of it.

To require us to rush to the grand jury to get an indictment when we have not completed our

investigation, I think that would be much more of a travesty of justice than having depositions where they can appear, they can cross-examine these witnesses and later down the road we can examine the issue of whether Crawford has been satisfied, whether the constitutional rights have been protected, whether this is a viable exception to the hearsay rule. Right now, we're just trying to preserve some testimony so when it comes to trial, these people have a voice. And to deny it, and this to me in the interest of justice, this is a case where that phrase cries out for a judicial remedy. This is the interest of justice. Without intervening and taking the depositions now, these witnesses will be gone, and, by and large, this will be an extremely difficult case to prove. And basically, it's a case that's directed at terminally ill individuals. And by preventing us from at least recording their testimony with them there, with them having a chance to cross-examine it, it's basically saying you can have a scheme directed at terminally ill individuals and, guess what, you can never be charged for it.

We're just requesting assistance from the Court in what we believe to be a truly extraordinary circumstance. It's going to be a very, very rare case, if ever again, that the Government will come in and

seek to take Rule 15 depositions pre-indictment.

We know this is unusual. We know there's not a lot of law. We know there's not a lot of precedent. We just believe this is such an extraordinary fact pattern where all these witnesses are on their deathbed that without judicial intervention and your authority now, a grave, grave injustice will take place.

THE COURT: Thank you.

All right. Rather than start this now, I think what I'd like to do -- I've got to go to a meeting. It won't take too long. So why don't we reconvene at one o'clock. I know Mr. Flanders has an argument at 2:30, but I think we should have plenty of time if we get back here at 1:00 or shortly thereafter and then I'll hear from all of you folks. And that will also give you a chance to maybe think about what you've heard here and decide how you want to approach this without having to do it off the cuff. Okay. So let's take an hour, and we'll reconvene at one o'clock.

(Recess taken at 12 o'clock)

THE COURT: All right. How would counsel like to proceed?

MR. TRAINI: I'll go ahead, if it please the Court, your Honor.

At the risk of snatching defeat from the jaws of

victory, your Honor, you can stop me any time you're going to deny the Government's motion, and I won't be offended.

THE COURT: All right.

MR. TRAINI: I think there are a couple of points that need to be responded to in addition to what I raised in the memo that I filed, Judge. I think that we, once again, need to go back to the Rule. I think the problem that we have right now is that the Government has the burden to demonstrate to the Court that it has the authority to do this.

THE COURT: Before you get too far into the Rule, what is your feeling about -- just assume that I think that the Rule allows this. Just assume it for purposes of this question. Do you have any dispute about the quantum of proof that the Government has put on with respect to the situation that these nine individuals are in, the imminence of their demise?

MR. TRAINI: It's difficult to answer for a couple of reasons, your Honor. One is that, for example, I heard Mr. Vilker say that the FBI agent recently interviewed one of the people and she determined that he was about to die. I don't know what her medical qualifications are.

Another one was, I think, [redacted], who

nobody can figure out why he's still alive after three years when they told him he was going to be dead in six months. He could live for another three years.

So I'm not sure that I'm satisfied with the quantum of evidence that they've offered the Court relative to this imminence of death, if you will. I think we need some more of that. And I also have some reservations about how we go about doing that because this is all protected medical information. This is all HIPAA information, Judge.

THE COURT: Those aren't your rights to assert.

MR. TRAINI: I understand that, but I don't know that anybody's here asserting those rights and somebody might want to do that. One of the things that is so troublesome about this whole process is that lots of people have lots of different rights and I'm not sure that they're all being accounted for in the equation. But having said that, it's difficult for me to just concede that they've met that burden in addition to the other ones that they haven't met.

THE COURT: Okay.

MR. TRAINI: I don't know if that answers your question --

THE COURT: Yes, it does.

MR. TRAINI: -- but that's the best I can do.

Going back to the Rule, Judge, the Government needs to demonstrate that they have the authority to do this. The only place that authority can come from is the Rule. There is no case law that supports the Government's position. They haven't cited anything. They haven't argued anything. They haven't brought you anything. The only cases that are out there that we know of that deal with this issue all say that Rule 15 depositions are not done in a pre-indictment context for a variety of reasons. The Mann case, which both of us cite in our respective memos, was a post-indictment deposition case, not a pre-indictment case.

THE COURT: Realistically speaking, how could you expect there to be any case law on this situation given that it's Crawford that's really driving it? Crawford is only a few years old.

MR. TRAINI: But even before Crawford -- Crawford isn't the only thing that's driving the bus here, your Honor. You have to look at the Rule, which you pointed out yourself earlier this morning, that historically, this Rule was a defendant's rule. The Government fought tooth and nail for decades to get the right to do this, and every time they did, the Rules Committee or the Supreme Court said no. The only time they relented, when they didn't really, was the

Government was able to convince Senator McClellan in the 1970's when they passed the Omnibus Crime Control Act to give them a statute because they couldn't get a rule so they got 3504, which said specifically after an indictment has been returned. And it was only in organized crime cases, and you had to certify that you had a witness who was probably going to be killed because he was an organized crime witness.

When that statute was repealed, it was repealed as part of the amendments to the Rules, and done, as I pointed out in the memo, the Supreme Court said that the Rule and the statute was substantially the same.

Nobody ever contemplated pre-indictment depositions for all the reasons that Mr. McAdams was unable to articulate to you this morning. I was listening to that argument, and I couldn't make any sense except for the fact that he was going all over the place trying to find someplace to hang his hat. And it isn't there. We have to stick to the burden. They have it. They haven't met it. They can't meet, and there's no case law that allows them to do it and that really should be the end of the matter.

And one of the reasons why that's the case, your Honor, is because, as you again pointed out, because you've obviously given this some thought, as we argued

to you, this is -- we're all at the very top of the slippery slope here. The application of Rule 15 doesn't depend on whether it's rare or not rare or complex or simple. The Rule is the Rule. And if it doesn't allow for something, it doesn't allow for something, whether, by the way, it's the defendant that wants it, or the target that wants, or the Government that wants it. And I can assure you that despite what Mr. McAdams said about his conversations with Mr. Flanders, which, by the way, I had nothing to do with, that if I was in here by myself not having had any previous contact with him and I wanted to take depositions of potential grand jury witnesses, you'd already be off the bench having denied my motion. There is no way in the world you're going to let a potential defendant in a grand jury investigation muck around with the grand jury and start taking depositions of potential grand jury witnesses. It isn't going to happen. That's why Rule 15 doesn't allow this.

The 3144 scenario is an entirely different thing. And to answer Mr. McAdams' question, what I was referring to in my memo, which I think I cited in Footnote 3 was Rule 15(a)(2) itself contains the language that says that it is the witness that has to request the deposition. That is the witness's

get-out-of-jail card. Those statutes and the Rule in connection with 3144 is designed for a specific purpose. It's deposition in lieu of detention. That is so a witness, usually a foreign national, can get out of jail. That's what that is all about. It's got nothing to do with this.

THE COURT: But if, as a matter of logic, if the Government has the power to detain someone and deprive them of their freedom in order to preserve their testimony, then logically, why wouldn't they have the ability to obtain it by virtue of a deposition, which is much less intrusive.

MR. TRAINI: On the witness maybe, but detaining a witness doesn't impact the rights of the target. It impacts the rights of the witness. The deposition impacts everybody's rights. And one of the problems we have is, and you raised it yourself on the Sixth Amendment issue, the whole point of the en banc opinion in Hayes was in the ruling that Hayes had no Sixth Amendment right, the target had no Sixth Amendment right to counsel until he was charged.

He tried to make the argument that the depositions triggered his Sixth Amendment right. And the Court said no. And the problem that we have is the Government can argue, if the depositions go forward,

that whatever the deficiencies were in the depositions, that the targets had no Sixth Amendment rights anyway so there's no prejudice to them. So if we're forced to do this, we can get blown out of the box later on the grounds that they can stand up and say you didn't have a Sixth Amendment right anyway because you weren't charged at the time.

THE COURT: I'm not sure they could get away with saying that, having already said that the reason that they're making this motion in the first place is because of Crawford.

MR. TRAINI: But, Judge, with all due respect, they don't get to confer constitutional rights on people. They don't get to decide whether we have them or not. And I can guarantee that they'll stand up in the Court of Appeals and say they didn't have any Sixth Amendment right because that would support the argument that they will have to make at the time. We're over here today. We're not in the First Circuit later on. I can protect my client's Sixth Amendment rights. I don't need any help from them. They don't get to decide what we do about confrontation rights. But I don't think that you can put us in a position where we have to choose between exercising or not exercising rights that we may or may not have. That's the

irreparable harm to the Defendants. Mr. McAdams was wrong when he said that the only irreparable harm that can come is to the Government. That's not true at all. And the fact that there is no authority for this --

THE COURT: Well, the harm -- it may be that both the Government and the targets have rights and issues here that are simply presented by this situation and are unavoidable. It seems to me that the rights that you're talking about, I'm not denying that they're real, but they seem more speculative or hypothetical than the interests or the rights that the Government is asserting, which is, Look, if we don't have this testimony, then there is no case, it all goes away. Which means that as long as you pick on people who are ready to die, you get away with the crime. That seems a lot more concrete to me than what you're -- I'm not denying that you don't have issues. I just see an irreconcilable tension here between the Government's interests in preserving trial testimony and your client's interests, Fifth and Sixth Amendment interests.

MR. TRAINI: But there are two, I think, pieces to the response to that, your Honor. One is that no matter what they tell you, no matter how they label it, they're not preserving trial testimony. They don't

even know what the trial is. They haven't indicted anybody. These depositions, whether they say they're to preserve trial testimony or not, these are discovery depositions. They want to use this stuff in the grand jury.

THE COURT: What if they were prohibited from using it in the grand jury?

MR. TRAINI: Okay. That's fine. I raised that issue in the memo. Does the Court want to get involved in interfering with the grand jury process?

THE COURT: That's the Court's job is to deal with grand jury problems, isn't it? That's when we're supposed to step in. No, I don't want to get involved.

MR. TRAINI: I don't know that that's true, your Honor. There's a line of cases starting with Branzburg and every day there's another one where lower courts are cautioned by courts of appeal not to fool around with what goes on in the grand jury. And I think that that's another slippery slope. You're walking into a mine field with boots on if you're going to start controlling what kind of evidence gets before the grand jury, because as I said in the memo, that means we have to do something like what you do in a Kastigar hearing. Now we have to freeze their evidence. We have to find out whether or not they used these depositions to

develop any other leads or any other evidence. This is going to open up a whole Calandra-Costello problem down the line, motions to dismiss. I can see where this is going to end up, and I don't think that you want to be there. And, more importantly, I don't think you have to go there. This is a situation where the Government cannot meet the burden. They can't even meet the materiality burden on the case itself because, as Mr. Vilker said to you -- and I'm really confused now because I don't know if this case is simple or if it's complicated. It's apparently simple enough that I could take these depositions with my eyes closed but it's so complicated that they can't indict it for six or eight months because it's such a complex case, but it's very simple for me to know exactly what questions to ask or not ask.

THE COURT: That I appreciate. But in fairness, what they're saying is that the factual information relating to each of these individuals is fairly straightforward and simple. The legal theories under which they would prosecute your clients are not straightforward and simple. They're complex. I'm not sure those are irreconcilable.

MR. TRAINI: I accept that, Judge. The problem is not whether they're irreconcilable. The problem is

I don't know what to do in the deposition unless I know the complicated part. I mean, yeah, I've been practicing law a long time but --

THE COURT: I asked the question when I first started inquiring of the Government and, you know, what happens if you don't even go to the deposition.

MR. TRAINI: Then they're going to say we waived our Sixth Amendment right to cross-examine, which we may not have had, but I'm sure the argument will be, well, they didn't have it, but if they had it, they waived it. Or they might get the opportunity to argue, like you said a minute ago, they gave it to us because they're the Government. They can give us our rights or not give us our rights. So they said, Okay, we gave them their rights but then they waived them. That's the position that I don't think the Court can put us in, and I think that's the reason, Judge, why Rule 15 depositions are not pre-indictment.

You saw the footnote in the Eisenberg opinion, Footnote 9, where the Court specifically makes the comparison to Rule 27 in the Civil Rules that says there is no corresponding rule that allows them. You saw Judge Reinhardt's dissenting opinion in Hayes. He didn't have to say all that stuff because the issue wasn't there, but he said it, and he was right, and he

was right for all the reasons he articulated, which I can't do better than he did.

You saw it in McHan where the defendant made the complaint as opposed to the Government and the court said no. That's the reason why you don't do Rule 15 depositions pre-indictment because of all these problems, not to mention all the stuff that happens in the grand jury. I think it was a little disingenuous for the Government to stand up here and say, well, it's okay for us to do all this and produce all this material because it's really not 6(e) material because we haven't presented anything to the grand jury. The opening line of their motion is the Grand Jury sitting in the District of Rhode Island is currently investigating the circumstances. I mean, it's either a grand jury investigation or it isn't. Or we're closed hearing or we're not. So I don't think that they can have their cake and eat it, too.

And this is the last thing I'll say, and I'll let Mr. Flanders take it from here, Judge, but it seems to me that given what we have and what we know and the historical aspects of the Rule and the fact that there was a tremendous effort by the Supreme Court over the years not to expand this Rule, I think it would be flying in the face of the intention of the Supreme

Court to go down this road. And for all the other reasons that I said, I think the appropriate course of action is to deny the Government's motion. Let them take a direct appeal from your order, which I believe they can do, or let them file a petition for mandamus. We shouldn't have to bear the burden of doing that because they're the ones that have to prove that they can do this and they just haven't been able to do it.

THE COURT: That's an interesting question because I have been thinking about what would happen if either I granted or denied this motion. And it seemed to me that either party would seek a stay or seek an emergency hearing before the Court of Appeals to challenge whatever I did. But it also seems to me that from reading these cases that the standard of review is abuse of discretion. So I think I've got a pretty good deal of discretion here. Now I'd just like to have you comment on that.

MR. TRAINI: I know the standard is abuse of discretion and I know that that's a difficult row to hoe. But we don't get to the abuse of discretion issue if the Rule doesn't allow this to be done.

THE COURT: If it's legal error, then it's abuse of discretion is your response.

MR. TRAINI: Right. And, you know, then I think